

Issue: Group II Written Notice with termination (failure to follow supervisor's instructions and disruptive behavior); Hearing Date: 12/02/03; Decision Issued: 12/02/03;
Agency: Dept. of Health; AHO: Carl Wilson Schmidt, Esq.; Case No. 446



COMMONWEALTH of VIRGINIA
Department of Employment Dispute Resolution

DIVISION OF HEARINGS

DECISION OF HEARING OFFICER

In re:

Case Number: 446

Hearing Date: December 2, 2003
Decision Issued: December 2, 2003

PROCEDURAL HISTORY

On September 8, 2003, Grievant was issued a Group II Written Notice of disciplinary action with removal for:

[Grievant] failed to follow supervisory instruction when requested to call a staff member to join the conversation with her supervisor. In addition, she exhibited disruptive behavior during the meeting with her supervisor.

On October 8, 2003, Grievant timely filed a grievance to challenge the Agency's action. The outcome of the Third Resolution Step was not satisfactory to the Grievant and she requested a hearing. On November 13, 2003, the Department of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On December 2, 2003, a hearing was held at the Agency's regional office. Grievant submitted documents for consideration but did not appear at the hearing.

APPEARANCES

Agency Representative
Witnesses

ISSUE

Whether Grievant should receive a Group II Written Notice of disciplinary action with removal for failure to follow supervisor's instructions and for disruptive behavior.

BURDEN OF PROOF

The burden of proof is on the Agency to show by a preponderance of the evidence that its disciplinary action against the Grievant was warranted and appropriate under the circumstances. Grievance Procedure Manual ("GPM") § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia Department of Health employed Grievant as a supervisor in one of its divisions. She had been employed by the Agency since January 2000. On January 15, 2002, Grievant received a Group II Written Notice for inappropriate and unprofessional behavior. On May 21, 2002, Grievant received a Group I Written Notice for unsatisfactory work performance.

Grievant was out of the office on Thursday, September 4, 2003 when one of her employees, Ms. MB, called into the office with a question requiring immediate attention. Since Grievant was not available, Grievant's supervisor, the Deputy Director, spoke with Ms. MB and attempted to address the question.¹ The Deputy Director informed the Division Director of the problem. The Division Director identified a resolution for the concern. When Grievant returned to work on Friday, September 5, 2003, the Deputy Director went to Grievant's office to inform Grievant of the problem and her discussions with Ms. MB and the Division Director. Grievant questioned the accuracy of the facts as described by Ms. MB. Grievant became confrontational. The Deputy Director decided that Ms. MB's participation in discussion about the issue would provide clarification. The Deputy Director instructed Grievant to call Ms. MB and bring her to the office to discuss the issue with Grievant and the Deputy Director. Grievant refused to call Ms. MB. The Deputy Director repeatedly instructed Grievant to call Ms. MB. Grievant repeatedly refused to call Ms. MB. Grievant told the Deputy Director that the Deputy

¹ The Deputy Director's practice was to rely on the chain of command when possible. The Division Director, however, had instructed the Deputy Director and others in the division that if a supervisor is out of the office when a subordinate employee raises an issue requiring immediate attention, the supervisor of the absent supervisor should resolve the issue. Thus, the Deputy Director was acting consistent with the Division Director's instruction when the Deputy Director spoke directly with Ms. MB and attempted to resolve the issue in Grievant's absence.

Director could call Ms. MB since Grievant was not going to do so. Grievant's telephone rang. The Deputy Director instructed Grievant not to answer the telephone until they had finished their discussion. Grievant answered the telephone and spoke with the caller forcing the Deputy Director to wait. After Grievant finished the telephone call, the Deputy Director again asked Grievant to call Ms. MB. Grievant told the Deputy Director to "write me up" for not doing what the Deputy Director instructed. Grievant told the Deputy Director two more times to "write me up." The Deputy Director remained calm through out her interaction with Grievant. In contrast, Grievant was loud, abrasive, and taunting towards the Deputy Director.

CONCLUSIONS OF POLICY

Unacceptable behavior is divided into three types of offenses, according to their severity. Group I offenses "include types of behavior least severe in nature but which require correction in the interest of maintaining a productive and well-managed work force." DHRM § 1.60(V)(B).² Group II offenses "include acts and behavior which are more severe in nature and are such that an additional Group II offense should normally warrant removal." DHRM § 1.60(V)(B)(2). Group III offenses "include acts and behavior of such a serious nature that a first occurrence should normally warrant removal." DHRM § 1.60(V)(B)(3).

"Failure to follow a supervisor's instructions, perform assigned work, or otherwise comply with established written policy" is a Group II offense.³ Grievant failed to follow the Deputy Director's instruction to contact Ms. MB and bring Ms. MB into the office so that the issue could be discussed fully. Grievant was also insubordinate in her actions towards the Deputy Director. The Agency has presented sufficient evidence to support its decision to issue a Group II Written Notice.

Accumulation of a second active Group II Written Notice "normally should result in discharge."⁴ Grievant has active Group II and Group I Written Notices. After considering the Group II Written Notice giving rise to this appeal and the active prior Written Notices, the Hearing Officer finds that the Agency has established as basis for Grievant's removal.

Grievant contends the Agency discriminated against her. No credible evidence was presented suggesting the Agency discriminated against Grievant.

² The Department of Human Resource Management ("DHRM") has issued its *Policies and Procedures Manual* setting forth Standards of Conduct for State employees.

³ DHRM § 1.60(V)(B)(2)(a).

⁴ DHRM § 1.60(VII)(D)(2)(b).

DECISION

For the reasons stated herein, the Agency's issuance to the Grievant of a Group II Written Notice of disciplinary action with removal is **upheld**.

APPEAL RIGHTS

You may file an administrative review request within **10 calendar** days from the date the decision was issued, if any of the following apply:

1. If you have new evidence that could not have been discovered before the hearing, or if you believe the decision contains an incorrect legal conclusion, you may request the hearing officer either to reopen the hearing or to reconsider the decision.
2. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

3. If you believe that the hearing decision does not comply with the grievance procedure, you may request the Director of EDR to review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Director
Department of Employment Dispute Resolution
830 East Main St. STE 400
Richmond, VA 23219

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 10 calendar days of the date the decision was issued. You must give a copy of your appeal to the other party. The hearing officer's **decision becomes final** when the 10-calendar day period has expired, or when administrative requests for review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from the Director of EDR before filing a notice of appeal.